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Sit Kim Hung Ronnie v Ian Michael Hampton & Anor

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-23NCvC-1–01 OF 2023
GAN TECHIONG JC
13 FEBRUARY 2024

C *Civil Procedure — Security for costs — Foreigners — Foreigner wife sued foreigner husband and firm of solicitors for damages for conspiring to defraud her — Husband, who had filed divorce petition against wife, applied for security for costs on ground she was impecunious — Whether husband's application failed on primary reason that wife was ordinarily resident within the jurisdiction — Order* D *23 r 1(a) Rules of Court 2012 — Whether additionally, husband's application was attempt to stifle wife's meritorious claims against defendants in the suit — Whether even if husband's application was refused, any costs payable between the parties arising from the suit could be provided for when husband's divorce petition was grant*

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In 1996, the plaintiff married the first defendant ('D1') in Hong Kong and set up their first matrimonial home there. The plaintiff was a Hong Kong passport holder whilst D1 held a United Kingdom passport. In 2009, the couple moved to Malaysia where they acquired their second matrimonial home and their son F went to a school in Kuala Lumpur. Over time, the relationship between the couple deteriorated. Without the plaintiff's knowledge, D1 instructed the second defendant firm of solicitors ('D2') to file a joint petition in court for the couple's divorce. The Family Court granted the petition and issued a divorce decree which became absolute. On discovering what D1 had done, the plaintiff G successfully applied to set aside the divorce decree arguing that the petition was filed without her knowledge and that her signature in the petition and supporting cause papers had been forged. Following the setting aside, the plaintiff filed the instant suit against D1 and D2 for damages for conspiring to defraud her of payments she would have obtained if she had not 'agreed' to the H terms of settlement contained in the impugned 'joint petition'. After failing in his attempt to strike out the plaintiff's suit, D1 filed the instant application ('encl 36') for an order that the plaintiff pay RM200,000 as security for costs before trial. The application was grounded on the assertion that the plaintiff was not ordinarily resident in Malaysia, owned no assets in the country and was I unemployed and had debts. In resisting encl 36, the plaintiff argued that the application was made to stifle her claim in the suit. She said the setting aside of the divorce order gave her a strong case for seeking compensation and other reliefs against the defendants. She also submitted that encl 36 was an afterthought when D1's attempt to strike out the suit failed.

Held, dismissing encl 36:

(1) Order 23 of the Rules of Court 2012 ('the ROC'), which governed an application for security for costs, provided for a two-stage inquiry in determining whether or not the application should be allowed. The matters specified in paras (a) to (d) of O 23 r 1 were independent of each other and if none of the situations described in those paragraphs existed, the application for security for costs could be dismissed in limine forthwith. But if any one of those situations existed factually, then the second step was to determine whether having regard to all the circumstances of the case, it was just to grant the application (see paras 19 & 21).

(2) Based on the law and the undisputed facts, para 1(a) of O 23 of the ROC did not apply to the plaintiff as she ordinarily lived with her son in the matrimonial home in Kuala Lumpur within the jurisdiction of this court. On that ground alone, encl 36 had to be dismissed (see para 23).

(3) Even if the plaintiff was regarded as someone who was ordinarily resident out of the jurisdiction, encl 36 would still be dismissed for the following reasons: (a) the setting aside of the divorce decree by the Family Court was evidence that the plaintiff's claim against the defendants was bona fide and not a sham and ought to go for trial. In the circumstances, the application for security for costs could be construed as an oppressive attempt to stifle the plaintiff's claim; (b) D1's unilateral petition to divorce the plaintiff was currently pending in the Family Court. If the divorce was granted, there would be division of the matrimonial assets such as the matrimonial home in Kuala Lumpur and the couple's assets in Hong Kong. In other words, there were assets within the jurisdiction of this court that could be partially used to provide for payment of costs (if any) between the parties arising from the suit; and (c) a judgment of this court was registrable in Hong Kong, where the plaintiff might be owning assets, for purposes of enforcement under the Foreign Judgments (Reciprocal Enforcement) Order of Hong Kong. This was one of the factors that weighed against granting encl 36 having regard to all the other circumstances of the case (see para 23 & 27–29).

[Bahasa Malaysia summary

Pada tahun 1996, plaintif berkahwin dengan defendan pertama ('D1') di Hong Kong dan mendirikan rumah perkahwinan pertama mereka di sana. Plaintif ialah pemegang pasport Hong Kong manakala D1 memegang pasport United Kingdom. Pada 2009, pasangan itu berpindah ke Malaysia di mana mereka memperoleh rumah perkahwinan kedua mereka dan anak lelaki mereka bersekolah di Kuala Lumpur. Lama kelamaan, hubungan antara pasangan itu semakin renggang. Tanpa pengetahuan plaintif, D1 mengarahkan

firma peguamcara defendan kedua ('D2') untuk memfailkan petisyen bersama di mahkamah untuk perceraian pasangan itu. Mahkamah Keluarga membenarkan petisyen itu dan mengeluarkan dekri perceraian yang menjadi mutlak. Apabila mengetahui apa yang telah dilakukan oleh D1, plaintif berjaya memohon untuk mengetepikan dekri perceraian dengan alasan bahawa petisyen itu difailkan tanpa pengetahuannya dan bahawa tandatangannya dalam petisyen dan kertas kausa sokongan telah dipalsukan. Berikutan pengetepian tersebut, plaintif memfailkan saman semasa terhadap D1 dan D2 untuk ganti rugi kerana bersubahat menipu pembayaran yang dia akan perolehi jika dia tidak 'bersetuju' dengan syarat penyelesaian yang terkandung dalam 'petisyen bersama' yang dipertikaikan. Selepas gagal dalam percubaannya untuk membatalkan saman plaintif, D1 memfailkan permohonan semas ('lampiran 36') untuk perintah supaya plaintif membayar RM200,000 sebagai jaminan kos sebelum perbicaraan. Permohonan itu berdasarkan penegasan bahawa plaintif tidak lazimnya bermastautin di Malaysia, tidak memiliki aset dalam negara dan menganggur serta mempunyai hutang. Dalam menentang lampiran 36, plaintif berhujah bahawa permohonan itu dibuat untuk menyekat tuntutannya dalam saman itu. Beliau berkata, pengetepian perintah perceraian memberinya kes yang kukuh untuk mendapatkan pampasan dan pelepasan lain terhadap defendan. Dia juga berhujah bahawa lampiran 36 adalah satu pemikiran semula apabila percubaan D1 untuk membatalkan saman itu gagal.

Diputuskan, menolak lampiran 36:

(1) Aturan 23 Kaedah-Kaedah Mahkamah 2012 ('KKM'), yang mengawal permohonan untuk jaminan kos, memperuntukkan siasatan dua peringkat dalam menentukan sama ada permohonan itu patut dibenarkan atau tidak. Perkara yang dinyatakan dalam perenggan (a) hingga (d) A 23 k 1 adalah bebas antara satu sama lain dan jika tiada satu pun situasi yang diterangkan dalam perenggan tersebut wujud, permohonan untuk jaminan untuk kos boleh ditolak dengan serta-merta. Tetapi jika mana-mana satu daripada situasi tersebut wujud secara fakta, maka langkah kedua adalah untuk menentukan sama ada dengan mengambil kira semua keadaan kes itu, ia adalah adil untuk membenarkan permohonan itu (lihat perenggan 19 & 21).

(2) Berdasarkan undang-undang dan fakta yang tidak dipertikaikan, perenggan 1(a) A 23 KKM tidak terpakai kepada plaintif kerana dia biasanya tinggal bersama anaknya di rumah sepencarian di Kuala Lumpur dalam bidang kuasa mahkamah ini. Atas alasan itu sahaja, lampiran 36 terpaksa diketepikan (lihat perenggan 23).

(3) Walaupun plaintif dianggap sebagai seseorang yang biasanya bermastautin di luar bidang kuasa, lampiran 36 masih akan diketepikan atas sebab-sebab berikut: (a) pengetepian dekri penceraian oleh

Mahkamah Keluarga adalah keterangan bahawa tuntutan plaintif terhadap defendan adalah bona fide dan bukan palsu dan patut dibicarakan. Dalam keadaan tersebut, permohonan jaminan untuk kos boleh ditafsirkan sebagai percubaan menindas untuk menyekat tuntutan plaintif; (b) petisyen unilateral D1 untuk menceraikan plaintif belum dilupuskan di Mahkamah Keluarga. Sekiranya penceraian dibenarkan, akan berlaku pembahagian harta sepencarian seperti rumah sepencarian di Kuala Lumpur dan aset pasangan di Hong Kong. Dalam erti kata lain, terdapat aset dalam bidang kuasa mahkamah ini yang boleh digunakan sebahagiannya untuk membuat peruntukan bagi pembayaran kos (Jika ada) antara pihak yang berbangkit daripada saman itu; dan (c) penghakiman mahkamah ini boleh didaftarkan di Hong Kong, di mana plaintif mungkin memiliki aset, untuk tujuan penguatkuasaan di bawah Perintah Penghakiman Asing (Penguatkuasaan Timbal Balik) Hong Kong. Ini adalah salah satu faktor penimbang terhadap pemberian lampiran 36 dengan mengambil kira semua keadaan lain kes itu (lihat perenggan 23 & 27–29).]

Cases referred to

Faridah Begum bte Abdullah v Dato' Michael Chong [1995] 2 MLJ 404, HC (refd)
Kasturi Palm Products v Palmex Industries Sdn Bhd [1986] 2 MLJ 310 (refd)
Mahon v Mahon [1971] 2 MLJ 266, FC (folld)
Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 351
Companies Act 2016 s 580A
Foreign Judgments (Reciprocal Enforcement) Order [HK] First Schedule, Part 2
Rules of Court 2012 O 23, O 23 r 1, 1(a), (b), (c)

Law Yoke Kuan (Lum & Partners) for the plaintiff.
Choo Dee Wei (with Dickson Loo) (Choo Dee Wei) for the first defendant.

Gan Techiong JC:

INTRODUCTION

[1] When marital strife brings on litigation, many an ugly allegation appears in the respective pleadings of man and wife. Such is the situation in this civil suit, wherein the plaintiff is the wife of the first defendant. The subject matter of this judgment is an application (encl 36) filed by the first defendant/husband for security for costs of RM200,000 to be given by his wife in this civil suit.

A **[2]** The plaintiff/wife is suing the first defendant/husband and a firm of solicitors (the second defendant) after having successfully set aside a decree nisi made absolute in a 'joint petition' filed at the Family Division of this court at Kuala Lumpur. I have stated 'joint petition' in inverted commas because the plaintiff/wife here denied having any knowledge of Joint Divorce Petition **B** No WA-33JP-2100–12 of 2017 and averred that her signature as a joint petitioner was *forged*. On 25 April 2022, the learned Family Court judge ruled in favour of the wife's application and set aside the Decree Absolute for the divorce. Thus, the plaintiff and the first defendant are still legally married to each other.

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[3] The first defendant/husband did not appeal against the setting aside of the aforesaid decree in the 'joint petition'. Instead, he has filed a second petition for divorce — this time a unilateral petition. According to both counsel, the **D** man and wife are still battling it out in the Family Court, with no end in sight yet.

[4] It is also noteworthy that the first defendant/husband had in fact applied to strike out the plaintiff/wife's action in this civil suit, and that his application **E** (encl 19) was dismissed with costs by my predecessor (Justice Rozana Yusoff) on 4 August 2023. The first defendant/husband then mounted his said application (encl 36) for security for costs to be furnished by his wife.

[5] In most cases, a marital dispute between a wife and her husband should **F** be heard by the Family Court. However, in this case, the plaintiff/wife's alleged cause of action against her husband and the second defendant is for conspiracy to defraud her of 'alimony, compensation and/or settlement payable by the first defendant to the plaintiff'. The plaintiff is alleging that the defendants conspired to forge her signature in a joint divorce petition and other cause **G** papers to deceive the Family Court judge into believing that she had agreed to the terms therein.

[6] The second defendant were the solicitors who prepared the 'joint petition' and obtained a decree nisi that was made absolute. The plaintiff is **H** seeking damages for the alleged conspiracy to deprive her of what could have been awarded to her through a unilateral divorce petition. Such a cause of action, founded in tort, is appropriate to be filed as a civil suit in the Civil Division of this court.

I UNDISPUTED FACTS

[7] The plaintiff/wife and the first defendant/husband are both foreigners in Malaysia; the wife being a holder of a Hong Kong passport while her husband holds a United Kingdom passport.

[8] The couple was married in Hong Kong on 31 January 1996, where their first matrimonial home was situated. Some *15 years ago*, in 2009, they moved to Malaysia. In 2013, a house located in a lane off Jalan Ampang Hilir in Kuala Lumpur, was purchased and used as their *matrimonial home* in Malaysia ('the matrimonial home').

[9] Their son Andrew went to school in Kuala Lumpur, and as at the date of filing of this civil suit, he was still a student in Malaysia under the care of the plaintiff. The plaintiff's permanent address in Malaysia is still at the matrimonial home.

[10] The plaintiff/wife has not been receiving money from the first defendant/husband for her living expenses in Malaysia and have been supported by funds from her relatives in Hong Kong.

THE GIST OF THE FIRST DEFENDANT/HUSBAND'S SUBMISSIONS

[11] The first defendant/husband's application to require his wife to give security for costs of RM200,000 was based on his following averments:

(a) the plaintiff's immigration status in Malaysia is temporary;

(b) the plaintiff's lack of assets in Malaysia;

(c) the plaintiff's unemployment and lack of income; and

(d) the plaintiff's outstanding debts.

[12] The whole basis of the first defendant/husband's application for security for costs of RM200,000 was based on his allegations that his wife is not ordinarily a resident in Malaysia and that he might not be able to recover costs from his wife if this civil suit is to be dismissed with costs in the future.

THE GIST OF THE PLAINTIFF/WIFE'S SUBMISSIONS

[13] The plaintiff's grounds for objecting to her husband's said application could be summarised as follows:

(a) the first defendant's application for security for costs was not filed promptly, and was an afterthought after the dismissal of his striking-out application;

(b) her current predicament was caused by the defendants and she is a victim of the fraud committed by the defendants, and is bringing this civil suit to seek justice;

(c) the first defendant has filed his application for security for costs of RM200,000 with a mala fide intention of stifling her claim, in order to deny her access to justice;

(d) she was shocked to discover that a divorce decree had been issued by the Family Court in a 'joint petition' for divorce that was filed upon the instructions of the first defendant with her signature being forged on the 'joint petition' and other documents;

(e) she had to undergo much mental agony to have been 'divorced' without her knowledge, and had incurred loss and damage in fighting to have the divorce decree set aside, inter alia, procuring the services of a professional document examiner to prepare a report regarding her 'forged signatures'; and

(f) after the Family Division of this court decided in her favour and ordered the impugned divorce decree to be set aside, she is of the view that she has a strong case to seek compensation and other reliefs from the first defendant and second defendant who filed the 'joint petition' — for conspiracy to defraud her, etcetera.

ANALYSIS OF THE FACTS AND LAW ON SECURITY FOR COSTS

[14] Both learned counsel had cited several authorities to support their respective submissions regarding the first defendan's application. Both counsel are in agreement that the applicable rule is O 23 of the Rules of Court 2012.

[15] As some of the authorities on security for costs were regarding applications under the Companies Act for security for costs against limited companies, I shall endeavour to point out the differences between s 580A of the Companies Act 2016 (*formerly in* s 351 Companies Act 1965) and O 23 of the Rules of Court 2012 because I am of the view that since the plaintiff is an individual person and not a company under the Companies Act, only the authorities on O 23 are applicable.

[16] The fact that an application for security for costs under the Companies Act is concerned solely with the ability of a company to pay costs to a successful defendant, was highlighted by the Court of Appeal in *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 at p 657 thereof:

> In order to appreciate the arguments of counsel in support of these appeals, it is necessary to hearken to the statutory provision under which the applications were made. It is s 351(1) of the Companies Act 1965 which reads:
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> > Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears *by credible testimony* that there is *reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence*, require sufficient security to be given for those costs and

stay all proceedings until the security is given.

As may be seen; and this is borne out by the authorities decided upon the parallel provisions in other common law jurisdictions; the section provides for a two-stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. *The first step* is for the court hearing an application in this regard to *determine whether there is credible evidence*. The *second step* is to ascertain *whether that evidence*, when found to be credible, *supports the belief that the company will be unable to pay the costs of a successful defendant*. (Emphasis added.)

[17] The Court of Appeal in *Skrine & Co v MBf Capital Bhd* described the hearing of an application for security for costs under s 351 of the Companies Act 1965 (currently s 580A of the CA 2016) as a two-stage inquiry. As could be seen, that statutory provision is solely about the ability of a company to pay costs to a successful defendant. This, in my view, is a necessary provision to ensure that companies with a minimal paid-up capital do not abuse the process of court and avoid paying costs when their claims are dismissed — bearing in mind that a limited company enjoys the legal privilege of limited liability, and it is not uncommon in Malaysia for a company with just RM2 paid-up capital to operate businesses by using of loans from its directors and shareholders.

[18] In contrast to s 580A of the Companies Act 2016, O 23 r 1 of the RC 2012 — which is applicable to the first defendan's application — gives the court a much wider discretion. It reads:

Where, on the application of a defendant to an action or other proceedings in the Court, *it appears to the Court* —

(a) that *the plaintiff* is *ordinarily resident out of* the jurisdiction;

(b) that *the plaintiff* (not being a plaintiff who is suing in a representative capacity) is *a nominal plaintiff* who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;

(c) subject to paragraph (2), that *the plaintiff's address is not stated in the writ* or originating summons or is incorrectly stated therein; or

(d) that the plaintiff has *changed his address* during the course of the proceedings *with a view to evading the consequences of the litigation*, then, if, *having regard to all the circumstances of the case, the Court thinks it just to do*, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just. (Emphasis added.)

[19] Rule 1(a) to (d) of O 23 are independent of each other, ie *not* conjunctive. Rules 1(b), (c) and (d) are applicable to a plaintiff who is ordinarily resident in the jurisdiction. Rule (1)(b) refers to a nominal plaintiff who is 'suing for the benefit of some other person', and presumably the

nominal plaintiff is a 'man of straw' who has no money to pay costs if his action is dismissed. Likewise, rr 1(c) and (d) respectively refer to a plaintiff who is evasive — in failing to state his address or deliberately stating a wrong address in the writ and one who changes his address midway 'with a view to evading the consequences of the litigation', ie a plaintiff with the intention of disappearing without paying costs if his action is dismissed by the court. It must be emphasised that rr 1(b), (c) and (d) are applicable to a plaintiff who is ordinarily resident *within the jurisdiction*, and not just to a plaintiff who is ordinarily resident *out of the jurisdiction* of our courts in Malaysia.

[20] The word 'ordinarily' in r 1(a) which reads '*ordinarily resident out of* the jurisdiction' simply means 'usually'. In layman terms, it refers to a plaintiff who is usually a resident in a place outside the jurisdiction of this court. If the purpose of O 23 is to require plaintiffs who are foreign citizens suing a citizen of Malaysia to give security for costs of his action, the rule could have simply said so. The said rule mentioned nothing about the citizenship of a plaintiff.

[21] Based on the wording of O 23 r 1 of the RC 2012, I am of the view that the application of O 23 is also a two-stage inquiry. The first step would be to determine, based on the facts of a particular case, whether the situation as described in r 1(a) or (b) or (c) or (d) exists. If the answer is in the negative, the plaintiff's application for security for costs could be dismissed *in limine* forthwith. If any of the situations described is found to exist factually, the second step as provided in r 1 would come into play: *'having regard to all the circumstances of the case,'* whether the court thinks it just to order the plaintiff to give such security for the defendant's costs of the action.

[22] Based on the law and undisputed facts cited in para [8] and [9] above, I found that the plaintiff is *not 'ordinarily resident* out of the jurisdiction' of this court, and hence O 23 r 1(a) is inapplicable to her. The plaintiff's place of residence has usually been the matrimonial home in Ampang, Kuala Lumpur — where she lives with her son Andrew. In coming to this finding, I was guided by the judgment of our Federal Court in *Mahon v Mahon* [1971] 2 MLJ 266 which held that a foreign wife who had her matrimonial home with her husband in Malaya was to be regarded as 'ordinarily resident' here. It was held as follows:

> With respect I think the learned judge appears to have overlooked the fact that immediately *after their marriage in Ireland on July 4, 1955 the parties left for Malaya and have for the past 15 years had their matrimonial home in the Federation. In the circumstances there can be no doubt that the petitioner has been 'ordinarily resident' in the Federation since 1955.* As Viscount Cave, LC said in *Levene v Commissioners of Inland Revenue* [1928] AC 217 222:
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> > The word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have

one's settled or usual abode, to live in or at a particular place'. A

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In most cases there is no difficulty in determining *where a man has his settled or usual abode*, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, *a master mariner who had his home at Glasgow* where his wife and family lived, and to which he returned during the intervals between his sea voyages, *was held to reside there, although he actually spent the greater part of the year at sea.* (Emphasis added.) B

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[23] Further, the first defendant/husband had found it fit to file a unilateral petition at the Family Division of this court to divorce the plaintiff — further fortifying my finding that they share a matrimonial home in Malaysia. As explained above, the failure of a defendant to cross the first stage of the two-stage inquiry under O 23 warrants a dismissal of his application. Based on my finding that the plaintiff is *not 'ordinarily resident out* of the jurisdiction' of this court, the first defendan's application for security for costs, which was filed pursuant to O 23 r 1(a), must fail. Be that as it may, I shall proceed to consider the circumstances of this case because *even if* the plaintiff is to be regarded as someone ordinarily resident out of the jurisdiction, I would still have dismissed the first defendan's application. My reasons are as follows. D E

[24] The courts in Malaysia have been consistent in holding that 'Security cannot now be ordered as of course from a foreign plaintiff, but only if the court thinks it just to order such security in the circumstances of the case'. In *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310, Dzaiddin J (*as this former Chief Justice then was*) emphasised the discretion vested upon the court in hearing such applications. It was held: F

Order 23 Rule 1(i) provides that the court may order security for costs *'if, having regard to all the circumstances of the case, the court thinks it just to do so.'* These words have the *effect of conferring upon the court the real discretion* and indeed the court is bound, by virtue thereof, *to consider the circumstances of each case*, and in the light thereof to determine whether and to what extent or for what amount a plaintiff may be ordered to provide security for costs. *It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.* (*Supreme Court Practice 1985* Vol 1 p 384). In exercising its discretion, it is clear that the court will have regard to all the circumstances of the case. G H

[25] The words of Dzaiddin J in Kasturi Palm Products were cited with approval by Arifin Zakaria J (as this other former Chief Justice then was) in *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 MLJ 404, as follows: I

Security cannot now be ordered as of course from a foreign plaintiff, but only if the court thinks it just to order such security in the circumstances of the case. This statement of the law was approved and adopted by Mohamed Dzaiddin J (as he then was) in *Kasturi Palm Products v Palmex Industries Sdn Bhd* [1986] 2 MLJ 310. Some indication of the relevant circumstances to be considered may be drawn from what was said by Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 at p 626; [1973] 2 All ER 273 at pp 285–286; [1973] 2 WLR 632 at p 646 wherein he said:

> *The court has a discretion which it will exercise considering all the circumstances of the particular case.* So I turn to consider the circumstances. Counsel for Triplan helpfully suggests *some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success.* Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that too would count. *The court might also consider whether the application for security was being used oppressively — so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct of the defendants*, such as delay in payment or delay in doing their part of the work.

[26] Arifin Zakaria J (as the former Chief Justice then was) went on in *Faridah Begum* to hold that the impecuniosity of a plaintiff is not a sufficient ground to order security for costs. He opined as follows:

> However, *the plaintiff's impecuniosity by itself* is *not a sufficient ground* for me to make the order for security for costs. As said by the Bingham LJ in *Thune & Anor v London Properties Ltd & Ors* [1990] 1 All ER 972 at p 979; [1990] 1 WLR 562 at pp 571–572:
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> > In approaching that question it cannot be too emphatically stated that impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security.

[27] In our present case, the plaintiff has pleaded that the first defendant/husband was not supporting her financially, and had filed a 'Joint Petition' to divorce her by forging her signature. The fact that the Divorce Decree was set aside by the Family Court is evidence that her claim is bona fide and not a sham, ie ought to go for trial when witnesses would be cross-examined under oath. In the circumstances, I am of the view that the first defendant/husband's application for security for costs of RM200,000 could, in the circumstances, be construed as an oppressive attempt to stifle the plaintiff/wife's claim.

[28] I had also taken into consideration the fact that being man and wife, there would, on a balance of probabilities, be matrimonial assets to be divided pursuant to their ongoing divorce proceedings under the unilateral petition,

for example, the matrimonial home in Kuala Lumpur and their assets in Hong Kong — where they married and lived for a few years before moving to Malaysia. In other words, there are assets within the jurisdiction of this court that could be partially set off to provide for payment of costs (if any) between this couple.

[29] Since there is a further possibility of the first defendant enforcing an order for costs (*if any such order is made in his favour in the future*), it was relevant for me to note that though Hong Kong has become part of the People's Republic of China as from July 1997, a judgment of this court remains registrable for reciprocal enforcement in Hong Kong. This could be seen in the Foreign Judgments (Reciprocal Enforcement) Order of Hong Kong wherein 'Malaysia' is specified in Part 2 of the First Schedule of the said order, and this court (the High Court) satisfies the definition of a court 'having unlimited jurisdiction in civil and criminal matters', and therefore its judgments are recognised in Hong Kong for registration and enforcement purposes there. The registrability of a judgment of this court in the jurisdiction where a foreign plaintiff owns assets is certainly one of the factors that weighs against ordering security for costs, having regard to all the other circumstances of the case. All the more so in this case where the plaintiff and the first defendant are both foreigners who married and lived in Hong Kong before moving their matrimonial home to Malaysia.

[30] I repeat my finding of fact that the plaintiff, who is still staying in the matrimonial home in Malaysia, is *not* ordinarily resident out of the jurisdiction of this court. It is my judgment that even if she is ordinarily resident out of the jurisdiction of this court, 'having regard to all the circumstances of the case' (applying O 23 r 1) as discussed above, I would still order the first defendant/husband's application for security for costs of RM200,000 to be dismissed. The first defendan's application (encl 36) was therefore dismissed with costs of RM5,000.

Enclosure 36 dismissed.

Reported by Ashok Kumar